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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 QUINTON P. BROWN,) No. CV-08-5091-JPH
9)
10 Plaintiff,) ORDER DENYING DEFENDANTS'
11 v.) MOTION TO DISMISS, SHOW
12 ELDON VAIL, et al.,) CAUSE WHY JURY DEMANDS
13 Defendants.) SHOULD NOT BE STRICKEN, AND
14) SETTING SCHEDULING
15) CONFERENCE
16) (Ct. Rec. 141)
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16 On December 16, 2010, the Court considered without oral
17 argument defendants' motion to dismiss scheduled December 20, 2010
18 (Ct. Rec. 141). Plaintiff filed a response in opposition on
19 December 1, 2010 (Ct. Rec. 145-146). Plaintiff, an inmate at the
20 Washington State Penitentiary (WSP) appears pro se. Assistant
21 Attorney General Sara Di Vittorio appears on behalf of defendants.
22 The parties consented to proceed before a magistrate judge (Ct.
23 Rec. 58).

24 Defendants moved to dismiss on May 1, 2009 (Ct. Rec. 47),
25 which the court granted in part (Ct. Rec. 61). The remaining
26 defendants include Vail, Garringer and Uttecht. They are being
27 sued now solely in their official capacity, as the court dismissed
28 plaintiff's claims against all defendants in their individual

1 capacities (Ct. Rec. 61). The sole remaining claim is plaintiff's
2 RLUIPA claim for injunctive relief (Ct. Rec. 61 at 19). Defendants
3 allege plaintiff has failed to amend his complaint to seek
4 injunctive relief. They argue he should not be given the
5 opportunity to amend at this late date since defendants advised
6 Mr. Brown at the telephonic conference June 30, 2010, they would
7 move to dismiss because he had not amended the complaint to seek
8 injunctive relief (Ct. Rec. 142 at 3, 5).

9 I. Prior and remaining claims

10 Plaintiff brought a civil rights action pursuant to 42 U.S.C.
11 § 1983, 42 U.S.C. § 1985 (3), and 42 U.S.C. § 2000cc (Ct. Rec. 10,
12 15, 61). His claims primarily relate to alleged difficulty
13 receiving appropriate "kosher" foods and religious items. As noted
14 on May 1, 2009, defendants filed their first motion to dismiss
15 pursuant to Fed. R. Civ. P. 12(b)(6)(Ct. Rec. 47). Defendants
16 moved to dismiss (1) all claims against defendants Vail,
17 Garringer, Uttecht, Young, and Friedman as a matter of law; (2)
18 plaintiff's First, Eighth, and Fourteenth Amendment claims, and
19 (3) claims regarding the prisoner grievance process (Ct. Rec. 47
20 at 2, 61 at 1). In his response to the earlier motion, Mr. Brown
21 moved to dismiss his Eighth Amendment claim without prejudice (Ct.
22 Rec. 53).

23 On July 28, 2009, the court partially granted defendants'
24 prior motion to dismiss (Ct. Rec. 61). The court dismissed Mr.
25 Brown's "First Amendment right to file grievances" and related §
26 1983 claims without leave to amend (Ct. Rec. 61 at 7-8, 18);
27 dismissed his equal protection (Fourteenth Amendment) claim
28 without leave to amend (Ct. Rec. 61 at 9-11, 18); and dismissed

1 the claim of a conspiracy to deprive plaintiff of equal
2 protection, also without leave to amend (Ct. Rec. 61 at 14-15,
3 19).

4 The court dismissed all claims against Defendants Young and
5 Friedman (Ct. Rec. 61 at 9, 11-13, 19).

6 The court found the only surviving claim is Mr. Brown's (1)
7 RLUIPA claim against defendants Vail, Uttecht and Garringer in
8 their official capacities, and (2) the sole available remedy is
9 injunctive relief (Ct. Rec. 61 at 15, 18-19). These are the
10 current remaining claims.

11 Defendants argue the court should dismiss Mr. Brown's
12 complaint without prejudice because he has failed to amend his
13 complaint to request injunctive relief, despite at least four
14 months notice he needed to amend or face dismissal. Defendants
15 argue plaintiff should not be permitted to amend at this late date
16 (Ct. Rec. 142 at 2-3, 148 at 2).

17 Plaintiff contends pleadings filed after the initial
18 complaint "gave defendants fair notice he was seeking injunctive
19 relief under RLUIPA" (Ct. Rec. 145 at 4). He cites: (1)
20 plaintiff's [motion] for injunctive relief (presumably Ct. Rec.
21 15, 97); (2) Brown's "response to defendant's response to
22 injunctive motion" (Ct. Rec. 105); (3) court's request for
23 additional briefing (Ct. Rec. 107), and Brown's reply to
24 defendant's motion to dismiss (Ct. Rec. 53 at 8)(Ct. Rec. 145 at
25 4).

26 Plaintiff moved for injunctive relief on February 26, 2009
27 (Ct. Rec. 15) but abandoned the motion on June 25, 2009 (Ct. Rec.
28 59, 69, 70). On December 1, 2009, he again moved for a preliminary

1 injunction and TRO seeking injunctive and declarative relief (Ct.
2 Rec. 97 at 2). He now appears to ask for leave to amend his
3 complaint to seek injunctive relief (Ct. Rec. 145 at 5). Mr. Brown
4 also states "[p]rior issues with defendants' motion to dismiss
5 pursuant to Fed. R. Civ. P. 12(b)(6) will be addressed on appeal."
6 (Ct. Rec. 145 at 2).

7 Defendants reply they would be "severely prejudiced" if
8 plaintiff is allowed to amend his complaint nearly two years after
9 the complaint was filed (Ct. Rec. 148 at 3). They point out
10 plaintiff has known for more than a year, when the court granted
11 in part defendants' previous motion to dismiss, his sole remedy is
12 injunctive relief for alleged RLUIPA violations (Ct. Rec. 148 at
13 2, citing Ct. Rec. 61)). Defendants further point out plaintiff
14 participated in a telephonic status conference on June 30, 2010.
15 Defendants advised Mr. Brown they intended to seek dismissal in
16 light of his failure to make a claim for injunctive relief. He has
17 not done so (Ct. Rec. 148 at 2-3; Ct. Rec. 138). In fact, Mr.
18 Brown has never amended his complaint.

19 II. Legal Standard

20 When considering a motion to dismiss the Court must liberally
21 construe the complaint in the plaintiff's favor and must take all
22 the pleaded facts as true. *Leatherman v. Tarrant County Narcotics*
23 *Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). A
24 motion to dismiss for failure to state a claim upon which relief
25 can be granted should not be granted unless it appears beyond
26 doubt that plaintiff can prove no set of facts in support of the
27 claim that would entitle him to relief. *See Hishon v. Ling &*
28 *Spalding*, 467 U.S. 69, 73 (1984)(citing *Conley v. Gibson*, 355 U.S.

1 41, 45-46 (1957)). In applying this standard, the court must read
2 the facts alleged in the complaint in the light most favorable to
3 the plaintiff and accept the plaintiff's allegations as true.
4 *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

5 Although the pleadings need only give the defendant notice of
6 the claims against him, the pleading standard is even more relaxed
7 for pro se plaintiffs. The Supreme Court has instructed that the
8 district court must liberally construe the complaint's allegations
9 when the plaintiff is pro se. See *Haines v. Kerner*, 404 U.S. 519,
10 520 (1972). This is particularly true in civil rights cases.
11 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

12 However, the Court cannot accept a claim as valid if the
13 facts alleged do not support the claim. Accordingly, the Court
14 cannot "supply essential elements of claims that were not
15 initially pled." *Ivey v. Board of Regents of the University of*
16 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Nor can the court infer
17 that a fact exists based on conclusory allegations pled. *Jones v.*
18 *Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984).
19 In litigation instigated by prisoners, the Court shall move sua
20 sponte to dismiss a complaint that fails to state a claim. 28
21 U.S.C. § 1915(a)(2)(B)(ii). Prior to dismissal, a pro se plaintiff
22 must be given leave to correct the complaint's deficiencies.
23 *McGuckin v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992). However,
24 the Court need not give such relief if it is "absolutely clear
25 that the deficiencies of the complaint could not be cured by
26 amendment." *Franklin v. Murphy*, 745 F.2d 1221, 1228 n.8 (9th Cir.
27 1984)(citation omitted); See also *Lopez v. Smith*, 203 F.3d 1122
28 (9th Cir. 2000)(citing *Doe v. United States*, 58 F.3d 494, 497

1 (1995).

2 III. Discussion

3 Plaintiff appears to seek additional time pursuant to Fed. R.
4 Civ. P. 15(d) to amend his complaint in order to add a request for
5 injunctive relief. Defendants move to dismiss pursuant to Fed. R.
6 Civ. P. 12 (c) (Ct. Rec. 141 at 1).

7 *Amending the complaint*

8 Federal Rule of Civil Procedure 15(a) permits a party to
9 amend with leave of court, and provides that the "court should
10 freely give leave when justice so requires." See *Janicki Logging*
11 *Co. v. Mateer*, 42 F.3d 561, 566 (9th Cir. 1994). Leave need not be
12 granted where the amendment of the complaint would cause the
13 opposing party undue prejudice, is sought in bad faith,
14 constitutes an exercise in futility, or creates undue delay. See
15 *Janicki*, 42 F.3d at 566; *Roberts v. Arizona Bd. Of Regents*, 661
16 F.2d 796, 798 (9th Cir. 1981). A district court's discretion to
17 deny leave to amend is particularly broad where the plaintiff has
18 previously filed an amended complaint. *Wagh v. Metris Direct,*
19 *Inc.*, 363 F.3d 821, 830 (9th Cir. 2003), *overruled on other grounds*
20 *by Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir.
21 2008). Defendants allege undue prejudice, but do not enlighten the
22 court with specifics.

23 Based on the pleadings filed by both parties after the
24 complaint, the court deems the complaint amended to include a
25 request for injunctive relief. See e.g., Ct. Rec. 15, 97, 99, 100,
26 105, 109 (plaintiff); Ct. Rec. 103 (defendant); and Ct. Rec. 107,
27 123 (Court).

28 Defendants' motion to dismiss (**Ct. Rec. 141**) based on

1 plaintiff's failure to amend the complaint **is denied**. To the
2 extent plaintiff seeks leave to amend to add a claim for
3 injunctive relief, it is denied as moot. The pleadings filed by
4 both parties have clearly referenced injunctive relief for a long
5 time.

6 IV. Order to Show Cause

7 Because the only remedy now available to plaintiff is the
8 equitable remedy of injunctive relief, and a plaintiff seeking
9 such relief is not entitled to a trial by jury, the parties are
10 directed to **show cause why the case should not be set for trial by**
11 **the court, by Thursday, December 30, 2010 at 6:30 p.m.**

12 V. Scheduling conference

13 The court will conduct **a telephonic scheduling conference on**
14 **Friday, January 28, 2011 at 11:00 a.m.** The parties shall call the
15 Court's public conference line at (509) 573-6934 five minutes
16 before the time scheduled for the conference.

17 VI. Conclusion

18 For the reasons discussed above, the defendants' motion to
19 dismiss for failure to timely amend (**Ct. Rec. 141**) is **DENIED**.

20 **IT IS ORDERED:**

21 1. Defendants' motion to dismiss (**Ct. Rec. 141**) is **DENIED**.

22 2. Plaintiff's **complaint is deemed amended** to included a
23 request for injunctive relief based on both parties' prior
24 pleadings.

25 3. The parties shall show cause, if any, on **or before**
26 **Thursday, December 30, 2010, at 6:30 p.m.** why the jury demands
27 (**Ct. Rec. 124, 128**) should not be stricken and the case set for
28 **trial by the court.**

3 5. The District Court Executive is directed to enter this
4 Order and to forward copies to plaintiff and counsel for
5 defendants.

6 DATED this 16th day of December, 2010.

S/James P. Hutton
JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE